UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STEIN, INC.,	)	**CASE NOS.**
	)	**09-CA-215131**
Respondent,	)	**09-CA-219834**
	)	
and	)	**CASE NO.**
	)	**09-CB-215147**
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA) LOCAL NO. 534,	)	
	)	
Charging Party,	)	
	)	
and	)	
	)	
INTERNATIONAL OPERATING ENGINEERS (IUOE) LOCAL 18,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA (LIUNA) LOCAL NO. 534,	)	
	)	
Charging Party.	)	
	)	
	)	
	)	

RESPONDENT STEIN, INC.'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. INTRODUCTION.

Counsel for the General Counsel's Answering Brief is inexplicably[1] silent on how to square its arguments and advocacy, and the analysis of the ALJ,[2] with the Board's Decision in Ridgewood Health Care Center, 367 NLRB No. 110 (April 2, 2019). Counsel for the General Counsel's Answering Brief is equally mute on how to reconcile the professed "litany of…violations of the Act"[3] purportedly engaged in by Stein with the facts present in Burns, where the Supreme Court of the United States nevertheless held that a Burns successor has the legal right to establish initial wages, hours, and terms and conditions of employment, and is not subject to a remedial "make whole" remedy for § 8(a)(5) "successor" violations. NLRB v. Burns Int'l. Sec. Srvcs., 406 U.S. 272, 294-296, 92 S.Ct. 1571 (1972).

Rather than relying on bombastic ipsi dixit,[4] Stein's Reply Brief will present the Board with record-based facts, coupled with settled, controlling legal precedents.

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[1] Ridgewood Health Care Center was decided on April 2, 2019, and Counsel for the General Counsel's Answering Brief was filed with the Board after that decision, on April 4, 2019.

[2] The ALJ, in holding that Stein forfeited its Burns right to establish initial terms and conditions of employment and was subject to a make whole economic remedy, expressly relied on Galloway School Lines, Inc., 321 NLRB 1422 (1966) (ALJ Dec. p. 23, n. 25). Galloway School Lines was overturned by the Board in Ridgewood Health Care Center: "Accordingly, because we conclude that the Galloway School Lines remedy constitutes an unwarranted extension of Love's Barbeque, that is contrary to the rationale of Burns, we overrule that case, and any case subsequently applying it, in relevant part". Id.

[3] G.C. Ansr. Br. p. 1.

[4] Counsel for the General Counsel's Answering Brief accuses Stein of being a "deceitful and unscrupulous" employer (G.C. Ansr. Br. p. 3); prone to engage in "unlawful schemes" (Id. at p. 16); that waged a "throw-everything-at-the-wall-and-hope-something-sticks approach to this litigation" (Id. at p. 8); which advanced "outrageous theor[ies]" (Id.at p. 11); that "…desperately cling to…fantasy" (Id. at n. 8).

II. LAW AND ARGUMENT.

A. Ridgewood Health Care Center.

The ALJ predicated his Burns forfeiture holding, and related punitive make whole remedy on the NLRB's decision in Gallaway School Lines, Inc., 321 NLRB 1422 (1966): "The Board, however, has held that a successor may forfeit its right to unilaterally set initial terms an conditions of employment by engaging in concomitant unfair labor practices. See, e.g., Galloway School Lines, Inc., 321 NLRB 1422 (1996) (Successor forfeited right to set initial terms by violating § 8(a)(3) with unlawful hiring plan designed to avoid having to recognize the collective-bargaining representative the predecessor's employee; as a remedy, ordered to restore and maintain previous terms and conditions.) (ALJ Dec. p. 23). That predicate precedent, however, was expressly overturned by the Board in Ridgewood Health Care Center, 367 NLRB No. 110 (April 2, 2019): "Accordingly, because we conclude that the Galloway School Lines remedy constitutes an unwarranted extension of Love's Barbeque that is contrary to the rationale of Burns, we overrule that case, and any case subsequently applying it, in relevant part". Id. In addition to finding that Galloway "…impermissibly tore the Love's Barbeque remedy from its doctrinal roots,"[5] the Board majority[6] properly held that Galloway was an affront to the Burns Supreme Court ruling:

> Expanding that remedy to encompass any successor employer who discriminates to any degree in hiring to avoid the Burns majority-based successor obligation goes too far. It effectively eliminates the otherwise customary Burns right to set initial employment terms unilaterally, even for an employer whose hiring discrimination is limited to a single predecessor employee whose hiring would have established a continuing majority in the successor unit. Imposing the same statutory bargaining obligation as that typically reserved for the exceptional "perfectly clear" successor –

[5] Love's Barbeque, 245 NLRB 78 (1979) involved precisely "…circumstances where a successor's widespread discriminatory hiring practices made it impossible to determine whether it would have hired all or substantially all of the predecessor unit employees absent the hiring discrimination". Ridgewood Health Care Center, 367 NLRB No. 110, ___ (2019).

[6] CHAIRMAN RING, MEMBERS KAPLAN and EMANUEL.

> and the same remedial obligation to rescind initial employment terms and to make employees whole at the predecessor's contractual wage rates – on employers who indisputably would have been ordinary Burns successors had they not violated § 8(a)(3), threatens to cross the line from the broad equitable relief permitted under § 10(c) of the Act to punitive action that the Board is prohibited from taking.

Id.

Ridgewood Health Care Center also held that Galloway School Lines served to undercut Burns' legal rationale:

> Furthermore, the holding of the majority in Galloway undercuts the fundamental economic rationale in Burns for permitting successor employers to set initial employment terms. The wrong committed by the discriminatory hiring practices of a successor employer that would not in any event have hired all or substantially all of the predecessor's employees can be effectively addressed by the traditional make-whole remedies of reinstatement in back pay for affected employees. The wrong committed by the avoidance of a successor bargaining obligation can be effectively addressed by the imposition of a remedial bargaining obligation.[7] But as the Supreme Court emphasized in Burns, many successors take over a distressed business that must undergo fundamental and immediate changes in employment terms to survive. Retroactive imposition of the predecessor's employment terms – with back pay and interest – on any employer who engages in discriminatory hiring to any degree runs counter the principal that initial terms must generally be set by "economic power realities". The Galloway remedy may be a deterrent to employers contemplating unlawful hiring schemes, but it also risks job loss and consequent financial ruin for all employee in the successor's enterprise. Such a potential outcome threatens the labor relations stability that the Board is statutorily bound to protect.

Id. (emphasis added).

Not only does Counsel for the General Counsel not offer any suggestion for maneuvering around Ridgewood Health Care Center, he offers no sound rational for continuing to recognize Advanced Stretchforming, 323 NLRB 529 (1997), which has the same doctrinal roots and rationale of Love's Barbeque that was rejected for policy and Burns' precedent-inconsistent reasons in Ridgewood

[7] Counsel for the General Counsel's Answer Brief statement that "a remedial bargaining order as a [remedial] consequence" in this case would be inappropriate, and contrary to Advanced Stretchforming completely ignores Ridgewood Health Care Center's stated holding.

Health Care Center. In point of fact, given that Stein was never a Burns "perfectly clear" successor,[8] and given the undisputed fact that Stein never once attempted to rig its Burns "successor" majority status through § 8(a)(3) discriminatory practices, this dispute presents even a stronger argument for excising Advanced Stretchforming as legitimate, recognized Board precedent.

B. Burns' Predicate Facts.

Counsel for the General Counsel's presentment of a professed "…litany of § 8(a)(1),(2),(3), and (5) violations of the Act"[9] purportedly committed by Stein only serves to demonstrate how wrong the Board's decisions were in Advanced Stretchforming and Galloway School Lines, Inc., and how right the Board was in its recent Ridgewood Health Care Center decision. The Answering Brief claims that Stein "fail[ed] to recognize and bargain with Laborers' International Union of North America (LIUNA), Local 534 (Laborers Local 534) as the exclusive bargaining representative of its laborers (laborers unit)" (G.C. Ansr. Br. p. 1). So did the employer in Burns. William J. Burns Int'l. Detective Agency, 182 NLRB 348, 348 (1970). The Answer Brief alleges that Stein "fail[ed] to continue the terms and conditions of employment set forth in the TMS/Laborers Local 534 collective-bargaining agreement" (Id.). So did the employer in Burns. Id.; NLRB v. Burns Int'l. Sec. Srvcs., 406 U.S. at 294. The Answer Brief charges that Stein "unilaterally chang[ed] mandatory subjects of bargaining including the existing terms and conditions of employment enjoyed by the laborers under TMS" (G.C. Ansr. Br. p. 1). So did the employer in Burns. Id. The Answer Brief charges that Stein "unlawfully inform[ed] TMS employees in November 2017 that once Respondent Stein commenced operations on January 1, 2018, all jobs would fall under Respondent Local 18". Id. That same "misconduct" was engaged in by

[8] ALJ Dec. p. 23. In its filed Cross-Exceptions, Counsel for the General Counsel did not take issue with the ALJ's factual finding that Stein was never a Burns "perfectly clear" successor.

[9] G.C. Ansr. Br. p. 1.

the employer in Burns. William J. Burns Int'l. Detective Agency, 182 NLRB 348, 352-353 (1970). The Answer Brief charges that Stein "unlawfully recogniz[ed] a minority union – Respondent Local 18 – as the exclusive bargaining representative of the laborers unit at a time when Respondent Local 18 did not represent an unassisted and uncoerced majority of that unit". Id. That very same "misconduct" was engaged in by the employer in Burns. Id. The Answering Brief accuses Stein of "unlawfully entering into a collective-bargaining agreement with Respondent Local 18, and applying the terms of that agreement, including the union's security and dues-check off provisions, on employees in the laborers unit". (G.C. Ansr. Br. p. 2). That same "misconduct" was engaged in by the employer in Burns. NLRB v. Burns' Int'l. Sec. Srvcs., 406 U.S. at 295-296. The Answering Brief accuses Stein of "unlawfully granting assistance and support to Respondent Local 18 when Respondent Local 18 did not represent an unassisted and uncoerced majority of the Laborers unit" (Id.). That very same "misconduct" was engaged in by the Burns employer. William J. Burns Int'l. Detective Agency, 182 NLRB 348, 352 (1970). Finally, the Answering Brief accuses Stein of "threatening or otherwise coercing employees in the laborers unit to joint [sic] and pay dues and fees to Respondent Local 18 when Respondent Local 18 did not represent an unassisted and uncoerced majority of that unit". Id. Again, the Burns employer similarly engaged in such "misconduct". Id. at 352.

Yet, as recognized in Ridgewood Health Care Center, notwithstanding the undeniable fact "that Burns involved an employer that attempted to evade successorship through other unlawful means", in the end it had not forfeited its Burns right to set initial terms and conditions of employment, and the NLRB "make whole" remedy against Burns was specifically and expressly overturned by the United States Supreme Court.

Just as Galloway School Lines and its progeny was recognized to be an affront to Burns, Advanced Stretchforming is equally repugnant to Burns. More importantly, Counsel for the General Counsel in his Answering Brief does not tell us why that is not the case.

C. "Appropriate Unit" Precedents in the Burns Successor Setting – Counsel for the General Counsel's Meaningless Distinctions and Utter Silence.

To get around the string of established precedents discussing "appropriate units" in the Burns successor setting presented in Stein's opening brief (Stein Br. pp. 41-68), Counsel for the General Counsel: (1) attempts to distinguish some of those precedents with meaningless, razor-thin factual differences; and (2) altogether ignores the vast majority of those precedents (G.C. Ansr. Br. pp. 9-11). Thus, Counsel for the General Counsel claims that Border Steel Rolling Mills, 204 NLRB 814 (1973) merely involved the acquisition of a maintenance unit classification to an already existing maintenance and repair unit. But Border Steel undeniably involved the application of Burns successorship principals, and undeniably was a Burns successor case. Id. at 821. We are told that P.S. Elliot Services, 300 NLRB 1161 (1990), implicated "…significant employee interchange among buildings and employees that had identical terms and conditions of employment" (G.C. Ansr. Br. p. 9). That is precisely the factual setting confronting the Board here (Stein Opening Br. pp. 6-7, 15). Counsel for the General Counsel also states that Indianapolis Mack Sales & Service, Inc., 288 NLRB 1123 (1988) was another case where the acquiring employer instituted "significant employee interchange" to "two units [that] shared nearly identical terms and conditions of employment" (G.C. Ansr. Br. p. 10). Since they are set forth in written collective bargaining agreements, there can be no genuine debate but that the three craft units formerly working for TMS at the AK Steel mill also shared "nearly identical terms and conditions of employment" (Stein Opening Br. pp. 6-7, 15). Again, there is no question but that Indianapolis Mack Sales & Service, Inc. was a Burns successor case, and applied Burns successor principals. 288 NLRB at 1126. In fact, Indianapolis Mack Sales & Service, Inc. was cited

and invoked by the ALJ here (ALJ Dec. p. 18), so Counsel for the General Counsel's effort to label it meaningless is not even supported by the ALJ's decision.

Counsel for the General Counsel has chosen to completely ignore the other "appropriate unit" Burns successor setting cases cited by Stein.[10] And, Counsel for the General Counsel attempts to avoid the factually-indistinguishable Division of Advice Memorandum Opinions cited by Stein[11] by claiming that they "are not binding on administrative law judges nor the Board" (G.C. Ansr. Br. p. 10). However, "General Counsel Memoranda may be persuasive to the extent they offer a persuasive argument on a legal subject". The Kroger Co. of Michigan, 199 LRRM (BNA) ¶ 1319 (N.L.R.B. Div. of Judges April 22, 2014).[12]

D. <u>Inappropriate Citations</u>.

Twice, Counsel for the General Counsel cites decisions that do not stand for the legal proposition asserted. Counsel for the General Counsel argues that Raymond F. Kravis Center for Performing Arts v. NLRB, 550 F.3d 1183 (D.C. Cir. 2008) purportedly blessed exclusive hiring hall provisions in a § 9(a) bargaining relationship (G.C. Ansr. Br. n. 10). At no point did the District of Columbia Circuit Court, or the underlying NLRB (351 NLRB 143 (2007)) state or hold that exclusive hiring halls were permissible in the § 9(a) setting. The fact of the matter is, neither Kravis Center party made or raised that argument. Counsel for the General Counsel and mis-cites Sand McGill Hospital

[10] North American Aviation, 162 NLRB 1267 (1967); Rock-Tenn, 274 NLRB 772 (1985); Deferiet Paper Co. v. NLRB, 235 F.3d 581, 584 (D.C. Cir. 2000); Trident Seafoods, Inc. v. NLRB, 101 F.3d 111 (D.C. Cir. 1996).

[11] Canteen Srvc. Co., 1992 WL 213830 (1992); Ginji Corp., 1987 WL 103432 (1987); Oneida Motor Freight, 1991 WL 682647 (1981).

[12] Counsel for the General Counsel continues to cite Trident Seafoods as enforcing the underlying Board Decision (G.C. Ansr. Br. p. 5). In point of fact, Trident Seafoods reversed the NLRB with respect to one of the units at issue in that case, holding that the Board had given much too weight to the bargaining history of the predecessor.

Corp., 357 NLRB 326 (2011) stands for the proposition that a Burns successor may not alter its predecessor's probationary period, under pain of a make whole remedy (G.C. Ansr. Br. pp. 18-19). Sand McGill Hospital wasn't even a Burns successor case, so the right to unilaterally establish initial terms and conditions of employment was not even at stake. Moreover, the case did not involve or implicate unilaterally altered probationary periods in a predecessor employer's labor agreement.

E. Procedural Challenge.

Counsel for the General Counsel's claim that Stein's brief should be stricken because its exceptions and brief did not comply with § 102.46 is a red-herring. The exceptions were extra-regulatory compliant, citing to the specific page when the error appears, and Stein's supporting brief leaves no doubt as to which exception the advocacy relates. The Board only requires "substantial compliance" in any event. Zurn v. Nepco, 316 NLRB 811, n. 1 (1995); Sea-Mar Comm. Health Ctrs., 345 NLRB 947, n. 1 (2005).

III. CONCLUSION.

For the foregoing reasons, and the reasons set forth in Stein's Opening Brief, the Decision and Order of the Administrative Law Judge should be reversed and vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Respondent Stein, Inc.'s Reply Brief in Support of Its Exceptions to the Administrative Law Judge's Decision has been served, via electronic mail, this 16th day of April, 2019, upon the following:

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